COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037363-00**

Eddie Yassin	Employee
Gennaro's Eatery	Employer
Guard Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Horan, McCarthy and Carroll)

APPEARANCES
Michael C. Akashian, Esq., for the employee
Edward M. Moriarty, Esq., for the insurer

HORAN, J. This appeal comes to us courtesy of the insurer, aggrieved by a hearing decision ordering the payment of § 34 benefits[1] to the employee from August 20, 2000, to date and continuing. For the reasons set forth below, we affirm the decision.

The judge found the following facts based upon the credited evidence of record. On August 19, 2000, the employee was working as a pizza maker for Gennaro's Eatery. (Dec. 3, Tr. I,[2] 8.) The employee and a female co-worker argued over mopping responsibilities. (Dec. 3, Tr. I, 12.) A male co-worker, a prep cook, "became involved in the dispute." (Dec. 3, Tr. I, 12-13.) The two men fought, and the employee was punched in the face. (Dec. 3, Tr. I, 13.) The employee, who had been the victim of a mugging on Christmas Eve in 1994, suffered flashbacks of that attack following the work-related assault. (Dec. 4.) These experiences, in the opinion of the impartial medical examiner, caused the employee's total incapacity from work. (Dec. 4-5.)

The insurer denied the employee's claim and raised the issue of § 27 as an affirmative defense. (Dec. 2.) The judge found that section did not bar the employee's

[1] Medical benefits and counsel fees were also ordered. (Dec. 8.)

[2] "Tr. I" designates the transcript from the first day of hearing on November 11, 2001; "Tr. II" makes reference to the continued hearing on January 8, 2002.

claim. (Dec. 9). The insurer now raises two issues. First, it contends the liability finding is arbitrary and capricious because the judge "failed to properly analyze the violent fight that formed the basis of the employee's claim . . . ." (Ins. br. 1.) Second, it maintains the judge's failure to find a § 27 violation was the result of an improper legal analysis. Id. We examine these issues in turn.

The insurer's brief is replete with references to the hearing transcripts. Most references concern the testimony of the employer and the prep cook, and their versions of the altercation. In her hearing decision, the judge properly listed the names of the insurer's witnesses, and did consider their testimony: "[d]ue to a lack of credibility on the part of the witnesses, I am unable to determine whether the employee struck the first blow . . . . I am satisfied that there was a verbal altercation leading to physical violence in which both the employee and the prep cook participated . . . ."[3] (Dec. 3-4.) However, as was her prerogative, she did not credit the defense witnesses' version of the *casus pugnae*.[4] She was under no legal obligation to expressly discredit the testimony of the other witnesses. "An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive." Hilane v. Adecco Employment Servs, 17 Mass. Workers' Comp. Rep. 465, 471 (2003). Moreover, the judge clearly credited the employee's testimony that the fistfight sprung from an argument over mopping responsibilities.[5]

[3] We note that Dillon's Case, 324 Mass. 102, 107 (1949), long ago held that "even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if it can be seen that the whole affair had its origin in the nature and conditions of the employment . . . ."

[4] The prep cook worker testified the fight did not involve work issues, but instead was motivated by the employee's animosity towards him as a Brazilian. (Tr. II, 10, 16.) He admitted punching the employee, but claimed it was a retaliatory strike. (Tr. II, 12.)

[5] "On August 19, 2000, the employee was engaged in his employment for the employer. He became involved in a dispute with [a] fellow employee concerning who was to mop up the floor…Another employee, a prep cook became involved in the dispute. An argument ensued during which the prep cook punched the employee in the face." (Dec. 3.)

The compensability of the employee's claim depended upon whether the fight stemmed from a work-related argument or disagreement. See Tripp's Case, 355 Mass. 515 (1969); Blanchard's Case, 335 Mass. 175 (1956); Dillon's Case, 324 Mass. 102 (1949); Chery v. Pine Street Inn, 13 Mass. Workers' Comp. Rep. 191 (1999); Cf. McLean-Jenner v. Beverly Manor of Plymouth Nursing Home, 12 Mass. Workers' Comp. Rep. 513 (1998)(compensation denied where domestic dispute unrelated to work was cause of deadly attack on the employer's premises).

Though acknowledging it likely played a role in the dispute, the judge rejected the insurer's argument that the fight actually resulted from the employee's personal animosity towards Brazilians. (Dec. 4.) We cannot say that, as a matter of law, the employee's personal prejudice operated to deprive him of workers' compensation coverage. The judge concluded that "[s]ince the altercation in which the employee was injured arose from the work-related argument, I find the employee's injury arose out of and in the course of his employment with the employer." (Dec. 5.) The record supports this finding; we are not free to disturb it. See G. L. c. 152, §§ 11C, 12(2).

The second issue raised by the insurer concerns the issue of § 27. This defense is an affirmative defense, and therefore the insurer carries the burden of proving the employee was guilty of serious and willful misconduct. See Chery, supra, at 197. Based on the facts found, the judge rejected the application of § 27. (Dec. 4, 9.) She was free to do so. Chery, supra.

Accordingly, the decision of the administrative judge is affirmed. Pursuant to § 13A(6), employee's counsel is awarded a fee of $1,276.27 for his successful defense of this appeal.

So ordered.

Mark D. Horan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge